Kerajaan Negeri Kelantan & Anor v Wong Meng Yit & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-171–04 OF 2012
RAMLY ALI, ZAHARAH IBRAHIMAND ALIZATUL KHAIR JJCA
27 JUNE 2012

Civil Procedure — Declaration — Application for — Application had effect of declaring state law invalid and ultra vires Federal Constitution — Whether failure to obtain prior leave of Federal Court judge to make application fatal — Whether application made without leave void and abuse of process of court — Federal Constitution art 4(3) & (4)

Officers of the second appellant raided the bookshops of the first and second respondents, seized 'Big Sweep' sweepstake lottery tickets from their premises and compounded the respondents for the offence of 'trading without a MPKB – BRI Licence (Big Sweep)' under the municipal by-laws. In carrying out the said action the appellants relied on the authority of their general powers under ss 9 and 102 of the Local Government Act 1976 to issue any orders and/or policies or enact any by-laws to prohibit and/or ban the sale of lotteries and sweepstakes in Kelantan. The respondents filed an originating summons ('OS') in the High Court seeking, inter alia, a declaration that the appellants had no jurisdiction or power under the Federal Constitution to enact, issue, pass or make any laws, by-laws, enactments, regulations, orders or policies to illegalise, ban or prohibit activities involving betting and lotteries, including sweepstakes, as they were matters which fell within the exclusive jurisdiction of Parliament. The basis of the OS was that the sale of lotteries and sweepstakes (including the 'Big Sweep' sweepstake) was legalised and permitted under the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965 — both federal laws — and that under art 74 of the Federal Constitution ('Constitution') only Parliament, and not the State Legislative Assembly, had authority to enact laws in respect of lotteries and sweepstakes in Malaysia. As such it was contended that the action that was taken against the respondents was unconstitutional, ultra vires and invalid under the Federal Constitution. The appellants applied to strike out the OS under O18 r 19(1)(d) of the Rules of the High Court 1980 on the ground (i) the respondents should have applied by way of judicial review rather than by OS since they were challenging a decision of a public authority and (ii) in any event, the respondents had not obtained prior leave of a Federal Court judge under art 4(4) of the Constitution before they made their application and such failure was fatal. The High Court dismissed the appellants' application which led to the instant appeal.

Held, allowing the appeal with costs and striking out the OS:

(1) Any proceeding for a declaration that a law was invalid or a declaration

that had the direct effect of declaring a law invalid and ultra vires the Federal Constitution (as in the present case) shall not be commenced without first obtaining leave of a Federal Court judge pursuant to art 4(4) of the Constitution on the ground mentioned in art 4(3) (see para 15).

(2) In the present case, the OS clearly challenged or questioned the validity of the relevant state law on the ground the State of Kelantan had no power to make such law. The OS clearly fell within the ambit of art 4(3) and (4) of the Constitution. It was not disputed that the respondents had not obtained prior leave of a Federal Court judge before instituting the OS (see para 18).

(3) The leave requirement under art 4(4) of the Constitution was mandatory without which the OS was void and invalid and an abuse of process of court and ought to be struck out (see para 22).

[Bahasa Malaysia summary

Pegawai-pegawai perayu kedua telah menyerbu kedai-kedai buku responden pertama dan kedua, telah menyita 'Big Sweep' tiket-tiket loteri cepu lumba kuda daripada premis mereka dan telah mengkompaun responden-responden untuk kesalahan 'trading without a MPKB-BRI Licence (Big Sweep)' di bawah undang-undang kecil municipal. Dalam meneruskan tindakan tersebut perayu-perayu telah bergantung kepada autoriti tentang kuasa am mereka di bawah ss 9 dan 102 Akta Kerajaan Tempatan 1976 untuk mengeluarkan sebarang perintah dan/atau polisi-polisi atau menggubal sebarang undang-undang kecil untuk menghalang dan/atau melarang penjualan loteri dan cepu lumba kuda di Kelantan. Responden-responden memfail saman pemula ('SP') di Mahkamah Tinggi memohon, antara lain, deklarasi bahawa perayu-perayu tidak mempunyai bidang kuasa di bawah Perlembagaan Persekutuan untuk menggubal, mengeluarkan atau membuat mana-mana undang-undang, undang-undang kecil, enakmen, peraturan, aturan atau polisi untuk mengharamkan, melarang atau menghalang aktiviti-aktiviti melibatkan perjudian dan loteri, termasuk cepu lumba kuda memandangkan ia merupakan perkara yang terangkum dalam bidang kuasa eksklusif Parlimen. Asas SP adalah bahawa penjualan loteri dan cepu lumba kuda (termasuk cepu lumba kuda 'Big Sweep' adalah sah dan dibenarkan di bawah Akta Loteri 1952 dan Racing Club (Public Sweepstakes) Act 1965 — kedua-duanya undang-undang persekutuan — dan bahawa di bawah perkara 74 Perlembagaan Persekutuan ('Perlembagaan') hanya Parlimen, dan bukan dewan undangan negeri, yang mempunyai kuasa untuk menggubal undang-undang berkaitan dengan loteri dan cepu lumba kuda di Malaysia. Oleh itu, adalah dihujahkan bahawa tindakan yang diambil terhadap responden-responden adalah tidak berperlembagaan, *ultra vires* dan tidak sah di bawah Perlembagaan Persekutuan. Perayu-perayu memohon untuk mengetepikan SP di bawah A 18 k 19(1)(d) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan (i) responden-responden seharusnya memohon

melalui semakan kehakiman daripada SP memandangkan mereka mencabar keputusan pihak berkuasa awam dan (ii) dalam mana-mana kejadian, responden-responden tidak mendapatkan kebenaran seorang hakim Mahkamah Persekutuan di bawah perkara 4(4) Perlembagaan sebelum mereka membuat permohonan dan kegagalan tersebut adalah serius. Mahkamah Tinggi menolak permohonan perayu-perayu yang mana membawa kepada rayuan ini.

Diputuskan, membenarkan rayuan dengan kos dan mengetepikan SP:

(1) Mana-mana prosiding untuk deklarasi bahawa undang-undang adalah tidak sah atau deklarasi yang mana mempunyai efek secara langsung yang mengisytiharkan undang-undang tidak sah dan ultra vires Perlembagaan Persekutuan (seperti dalam kes ini) tidak seharusnya dimulakan tanpa mendapatkan kebenaran terdahulu hakim Mahkamah Persekutuan menurut perkara 4(4) Perlembagaan berdasarkan alasan yang disebutkan dalam perkara 4(3) (lihat perenggan 15).

(2) Dalam kes ini, SP dengan jelas mencabar atau mempersoalkan kesahan undang-undang negeri yang relevan atas dasar Negeri Kelantan tidak mempunyai kuasa untuk membuat undang-undang sedemikian. SP dengan jelas terangkum dalam lingkungan perkara 4(3) dan (4) Perlembagaan. Adalah tidak disangkalkan bahawa responden-responden tidak memperoleh kebenaran terdahulu hakim Mahkamah Persekutuan sebelum memulakan SP (lihat perenggan 18).

(3) Keperluan kebenaran di bawah perkara 4(4) Perlembagaan adalah mandatori yang mana tanpanya SP adalah terbatal dan tidak sah dan penyalahgunaan proses mahkamah dan seharusnya diketepikan (lihat perenggan 22).]

Notes

For cases on application for declaration, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2519–2551.

Cases referred to

Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah [1988] 1 MLJ 171, SC (refd)

Stephen Kalong Ningkan v Tun Abang Hj Openg & Tawi Sli (No 2) [1967] 1 MLJ 46 (refd)

Legislation referred to

Federal Constitution arts 4(3), (4), 74, 75
Interpretation Acts 1948 and 1967 s 23
Local Government Act 1976 ss 9, 9(1), 102(i)
Lotteries Act 1952

Racing Club (Public Sweepstakes) Act 1965
Rules of the High Court 1980 O18 r 19(1)(d), O 53

Appeal from: Originating Summons No 24–54 of 2011 (High Court, Kuala Lumpur)

Sulaiman Abdullah (Abu Bakar Jais with him) (Hisham Sobri & Kadir) for the appellants.
Ryan Ng (Phang Soon Mun with her) (Sheng Lee Law Office) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the appellants/defendants against the decision of the learned High Court judge dismissing the appellants' application to strike out the whole of the respondents' originating summons ('OS') dated 6 June 2011 under O 18 r 19(1)(d) of the Rules of the High Court 1980 ('RHC'), on the ground that the said application was an abuse of the process of the court.

FACTUAL BACKGROUND

[2] On 26 February 2011 officers from the second appellant, Majlis Perbandaran Kota Bharu, Bandaraya Islam, raided the bookshops of the first and second respondents in Kota Bharu and seized 'big sweep' sweepstake lottery tickets from each of the first and second respondents' bookshops and later they were compounded for the offence of 'trading without a MPKB-BRI Licence (Big Sweep)' under the Trade, Business and Industry (Municipal Council of Kota Bharu) By-laws 1989.

[3] The 'big sweep' tickets affected by the said raid are sweepstakes made lawful and permitted under the Racing Club (Public Sweepstakes) Act 1965 (federal law). In carrying out the raid, the appellants relied on the authority of their general powers pursuant to s 9 and also s 102 of the Local Government Act 1976 to issue any orders and/or policies to prohibit and/or ban the sale of lotteries and sweepstakes in the State of Kelantan.

[4] Section 9(1) of the Local Government Act 1976 states:

> (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

[5] Section 102(i) of the same Act, provides:

A In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area and in particular in B respect of all or any of the following purposes:

(i) to define the streets or areas within which shops, warehouses, factories or business premises may not be erected, or within which specified trades, businesses or callings may not be established or carried on.

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[6] The respondents filed an OS against the appellants on 6 June 2011 and prayed for the following orders, namely:

(a) a declaration that the State of Kelantan, acting through the appellants or otherwise, may not enact, issue, pass or make any:

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(i) laws or enactments to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes;

(ii) orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes;

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(b) a declaration that matters involving betting and lotteries, including sweepstakes fall within the exclusive jurisdiction of Parliament to the exclusion of the State Legislative Assembly of Kelantan;

F (c) a declaration that the appellants have no jurisdiction or power under the Federal Constitution to enact, issue, pass or make any laws, by-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes; and

(d) general damages.

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[7] The basis of the respondents' OS, based on the affidavit in support affirmed on 3 June 2011, and the respondents' submissions, are as follows:

(a) the 'Big Sweep' affected by the said action is a sweepstake made lawful and H permitted under the Racing Club (Public Sweepstakes) Act 1965;

(b) pursuant to Article 74 of the Federal Constitution, only Parliament, as the legislative body of the Federal Government of Malaysia, is seized of the authority to enact laws in respect of lotteries and sweepstakes in Malaysia since these are legislative matters listed under the Federal List in the I Federal Constitution;

(c) lotteries and sweepstakes in Malaysia are governed by the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965 respectively being federal laws which have been drafted by Parliament pursuant to Article 74 of the Federal Constitution;

(d) pursuant to Article 74 of the Federal Constitution, the 1st Appellant's legislative body has no authority whatsoever to enact any state laws on lotteries and sweepstakes since these are not legislative matters listed under the State List but instead listed under the Federal List in the Federal Constitution;

(e) the 2nd Appellant also has no power whatsoever to enact any local authority by-laws in relation to lotteries and sweepstakes;

(f) pursuant to the provisions of the Lotteries Act 1952, only the Minister of Finance has the power to impose conditions on the manner in which and the places at which lottery tickets may be sold or distributed in Malaysia;

(g) pursuant to the provisions of the Racing Club (Public Sweepstakes) Act 1965, racing clubs which are members of the Malayan Racing Association are authorised to promote sweepstakes in Malaysia and everyone (including anyone who is not a member of the said racing club) is entitled to participate in the sweepstakes;

(h) as there are Federal laws governing lotteries and sweepstakes, namely the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965, the 1st Appellant has no power and is not entitled to implement its general powers under the Local Government Act 1976, in particular section 9, to issue any orders and/or policies to prohibit and/or ban the sale of lotteries and sweepstakes made lawful and permitted under the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965 in the State of Kelantan;

(i) likewise, the 2nd Appellant has no power and is not entitled to implement its general powers under the Local Government Act 1976, in particular section 102, to enact any local authority by-laws to prohibit and/or ban the sale of lotteries and sweepstakes made lawful and permitted under the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965;

(j) the said action is not in accordance with Federal laws which have been drafted by Parliament, namely the Lotteries Act 1952 and the Racing Club (Public Sweepstakes) Act 1965, hence the said action is unconstitutional, ultra vires and invalid according to Article 75 of the Federal Constitution and section 23 of the Interpretation Acts 1948 and 1967.

[8] The appellants on 3 August 2011 filed their application to strike out the respondents' OS under O 18 r 19(1)(d) of the RHC 1980, based on two main grounds, namely:

(a) that the respondents' application ought to have been commenced by way of a judicial review and not by way of an ordinary civil action or originating summons (OS); and/or

(b) even if the proceedings by way of ordinary civil action or OS is correct,

A the respondents action ought to have been brought after leave of a Federal Court judge had first been obtained under art 4(4) of the Federal Constitution.

B **[9]** On 29 February 2012, the learned High Court judge dismissed the appellants' application with costs of RM2000. Hence, the present appeal.

[10] In opposing the appellants' application for the striking out of the OS, the respondents submitted that leave of a Federal Court judge under art 4(4) of
C the Federal Constitution is not required based on the following grounds:

(a) the respondents never prayed for an order to overturn or declare any law passed by the Kelantan State Legislative Assembly as unconstitutional within the meaning of art 4(3) of the Federal Constitution;

D (b) the by-laws passed by MPKB under the Local Government Act 1976 do not fall under the purview of art 4(3) of the Federal Constitution;

(c) the respondents are merely seeking, among others, a declaratory relief from the court to declare that the appellants have no powers to enact,
E issue, approve or legislate any laws, enactments, directions and/or policies to ban gambling activities and lotteries such as sweepstakes. In this regard, it is entirely different relief from declaring a law passed by the appellants to be unconstitutional within the meaning of art 4(3) of the Federal Constitution.

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FINDINGS OF THIS COURT

G **[11]** The nature of the respondents' claim or action in the OS can clearly be read and understood from the reading of the prayers in the OS itself supported by the supporting affidavit. Prayers (a)–(c) prayed for declaratory orders. In effect through all the three prayers the respondents are challenging the validity of 'any laws, by-laws, regulations, orders or policies to make illegal, ban or
H prohibit activities involving betting and lotteries, including sweepstakes' made by the State of Kelantan. They also in effect are challenging the jurisdiction or power of the State Legislative Assembly of Kelantan to make those laws which they claim to be within the exclusive jurisdiction of Parliament.

I **[12]** The declarations sought can clearly be understood to be a challenge by the respondents that the laws in question as implemented by the first appellant are unconstitutional, ultra vires and invalid according to arts 74 and 75 of the Federal Constitution allegedly because the first appellant has no jurisdiction or power under the Federal Constitution to enact, issue, pass or make any laws,

by-laws, regulations, orders or policies to make illegal, ban or prohibit activities involving betting and lotteries, including sweepstakes.

[13] Article 74 of the Federal Constitution provides:

(74 (1)) without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

((2)) without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

((3)) the power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

((4)) where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[14] Article 75 of the Federal Constitution provides:

75 If any state law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[15] The law on this issue is well-settled. It is trite that any proceeding for a declaration that a law is invalid or a declaration that has the direct effect of declaring a law is invalid and ultra vires the Federal Constitution (as in the present case) shall not be commenced without first obtaining leave of a judge of the Federal Court pursuant to art 4(4) of the Federal Constitution on the ground mentioned in art 4(3).

[16] Article 4(3) provides:

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

[17] Article 4(4) provides:

> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[18] In the present case, the respondents' OS clearly challenges or questions the validity of the relevant state law on the ground that the State of Kelantan has no power to make such law. Therefore, the respondents' action through the OS clearly falls within the ambit of art 4 cll (3)–(4) of the Federal Constitution. It is not in dispute that the respondents have not obtained any prior leave of a judge of the Federal Court before instituting the present OS in the High Court at Kuala Lumpur.

[19] The object and purport of art 4(4) of the Federal Constitution has already been interpreted before in the case of *Stephen Kalong Ningkan v Tun Abang Hj Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46. The same interpretation was adopted and followed by the Supreme Court in the case of *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171 where Hashim Yeop A Sani SCJ said:

> Article 4(3)–(4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity. In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, art 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

[20] In that case (*Abdul Karim*) the applicant therein was seeking, among others, for declarations that the respondent therein was not empowered to make laws with respect to the matter of disqualification for membership of the Assembly, and thus had illegally and unconstitutionally usurped the powers of Parliament. The orders sought were as follows:

> (a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No 3 of 1986.
>
> (b) a declaration that the Constitution (Amendment) Enactment No 3 of 1986 of the State of Sabah thereby effecting an amendment to the Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondents' incompetence to enact the same.

[21] In dismissing the applicant's application Hashim Yeop A Sani SCJ held:

> Now we come to the application for leave. The application is under art 4(4) of the Federal Constitution. Proceedings for declaration under art 4(4) of the Federal Constitution that a law is invalid on the ground mentioned in cl 4(3), that is the legislature concerned has no power to enact it, shall not be commenced without leave of the judge of the Supreme Court.

[22] The 'leave' requirement under art 4(4) of the Federal Constitution is mandatory. Without the said leave the respondents' OS, which clearly falls under art 4(3)–(4) of the Federal Constitution, cannot be commenced at all. Therefore the OS filed by the respondents is void and invalid. In other words, the respondents' OS is bound to fail and obviously unsustainable. It is an abuse of the process of the court. On that stand, the said OS ought to be struck out under the O 18 r 19(1)(d) of the Rules of the High Court 1980.

[23] On the above considerations, we are of the view that the respondents' OS has failed to comply with the mandatory requirement under art 4(4) of the Federal Constitution and therefore must fail. On that ground alone, the appeal before us ought to be allowed with costs.

[24] The appellant also raised the issue of judicial review in that the respondents' application should be made by way of a judicial review vide O 53 of the Rules of the High Court 1980. The appellant contended that any action to challenge the decision of a public authority must be commenced by way of a judicial review; and by filing the OS in the present case, the respondents are clearly trying to circumvent the strict requirements of the said O 53. Therefore the appellants contended that the respondents' application is misconceived, invalid and cannot be sustained in law.

[25] The respondents on the other hand argued that the process of judicial review is not applicable in the present case because there is no decision by the appellants capable of being judicially reviewed. The respondents further argued that the respondents' application deals with the interference by a public authority with an individual's private and personal right to earn a living or run a trade or business; and therefore the respondents claimed to be entitled to litigate by way of a civil claim.

[26] In view of the earlier findings by this court that the respondents' OS has failed to comply with the mandatory requirement for 'leave' of a Federal Court judge under art 4(4) of the Federal Constitution and on that ground alone, the appeal should be allowed and the respondents' OS must be struck out under O 18 r 19(1)(d) of the RHC 1980, we feel that the issue of judicial review is redundant and no more relevant to the present appeal. It is sufficient for us to

indicate here, at this point, that if what is being challenged by the respondents is the raid on the shops and seizure of the sweepstake tickets and the decision to compound the respondents for the alleged offence, then the proper procedure to be taken by the respondents should be by way of a judicial review under O 53 of the RHC 1980, and not by way of an OS.

CONCLUSION

[27] On the above considerations, we are satisfied that the learned High Court judge has erred in dismissing the appellants' application to strike out the respondents' OS under O 18 r 19(1)(d) of the RHC 1980. We find that based on the circumstances of the case as well as the pleadings of the respondents, it is obvious that the respondents' OS cannot stand in law and clearly unsustainable; and should be stuck out as it amounts to an abuse of the process of the court.

[28] We therefore allow the appeal with costs of RM10,000 to the appellants; and make an order that the deposit (if any) be refunded to the appellants. We set aside the order made by the learned High Court judge on 29 February 2012 and order that the respondents' OS be struck out.

Appeal allowed with costs and OS struck out.

Reported by Ashok Kumar